CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~198~~ 205.

EMANUEL FELSENHELD, CLAIMANT OF 288 PACKAGES OF MERRY WORLD TOBACCO, PLAINTIFF IN ERROR,

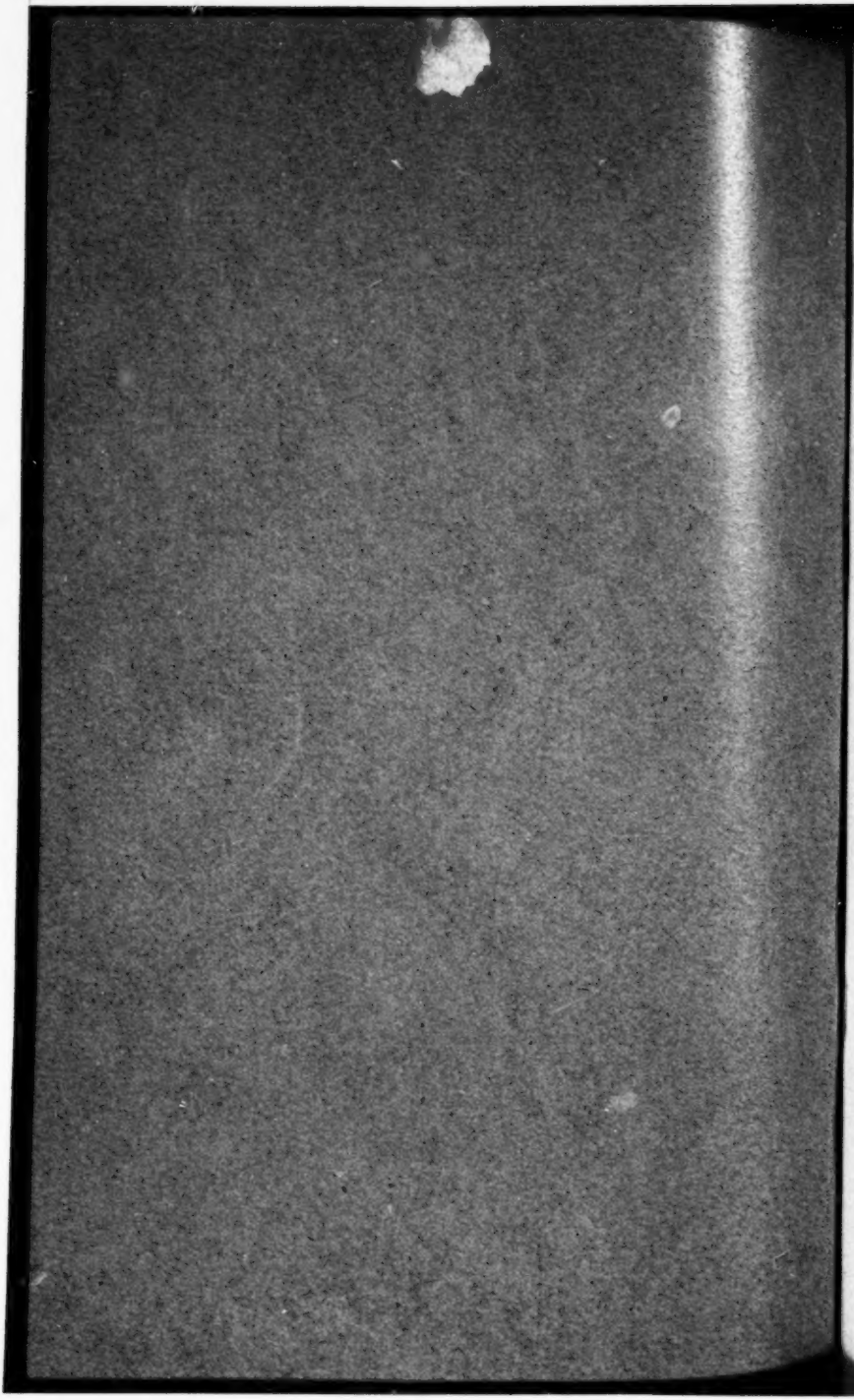
vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED DECEMBER 6, 1900.

(17,984.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1900.

a EMANUEL FELSENHELD, Claimant of 288 Packages of Merry World Tobacco, Plaintiff in Error,
versus
UNITED STATES OF AMERICA, Defendant in Error.

On certificate from the United States circuit court of appeals for the fourth circuit, at Richmond.

Henry M. Russell, Wheeling, W. Va., and John De Witt Warner, 111 Broadway, N. Y., counsel for plaintiff in error.

Chas. J. Faulkner, Kellogg bldg., Washington, D. C., and Joseph H. Gaines, U. S. att'y, Charleston, W. Va., counsel for defendant in error.

1 United States Circuit Court of Appeals, Fourth Circuit.

EMANUEL FELSENHELD, Claimant of 288 Packages of "Merry World Tobacco," Plaintiff in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 379.

In error to the district court of the United States fo- the district of West Virginia, at Martinsburg.

This is to certify that on the 17th day of October, in the year 1898, in the district court of the United States for the district of West Virginia, the United States of America, through its attorney, filed its information against five cases, each containing 288 packages of chewing and smoking tobacco, known by the name and brand of "Merry World tobacco," then in the custody of the collector of internal-revenue for the said district, having been seized by such collector; that this information contained two counts, one alleging that at the time of said seizure the said packages and each of them had packed in, attached to, and connected with them a certain article other than the manufacturer's wrappers and labels, the internal-revenue stamp, and the tobacco—that is to say, a small slip of paper called a coupon. This coupon was fully described in this count of the information and is particularly set forth in

2 *in* the agreed statement of facts hereinafter contained.

The second count of the information alleged that each of the said packages had affixed to, branded, stamped, marked, and printed upon the contents of said packages and each of them certain promises and offers of and orders and certificates for certain gifts, prizes, premiums, payments, and rewards; which promises, offers, orders, and certificates were those contained in the said coupon already referred to.

It is also certified that on the same day Emanuel Felsenheld, through his attorney, intervened, claiming to be the owner of the tobacco which had been seized, insisting that the seizure was not justified by law and asking leave to defend, and he was thereupon permitted to do so.

It is further certified that an agreement of the facts was entered into between the United States and the claimant, and that the facts set forth in this agreement were those on which the district court heard and determined the case, there being no evidence introduced, except this agreed statement of facts was in the following words:

Agreed Statement.

It is agreed by and between the United States of America, through Joseph H. Gaines, the district attorney of the United States for the district of West Virginia, on the one part, and Emanuel Felsenheld, by Henry M. Russell, his attorney, on the other part, that upon the trial of the above-entitled case the statements herein contained may be treated as facts and may be considered by the court and jury before whom the case shall be tried, and that it shall not be necessary for either party to introduce in proof of the said facts or of any of them any evidence except this agreement; but as to the several documents and expressions of opinion by departmental officers hereinafter contained, the genuineness of said documents and the fact said expressions of opinion were made is admitted, and not the relevancy of said documents and expressions, nor the truth of any facts stated in them, nor the correctness of any such opinions.

3 On the 23rd day of September, in the year 1898, at the city of Wheeling in the district aforesaid, the internal-revenue collector of the United States did seize 1,440 packages of chewing and smoking tobacco known by the name and brand of Merry World tobacco, weighing one and two-thirds ounces to the package and having a total weight of 150 pounds, and that afterwards, on the 5th day of April, in the year 1899, J. K. Thompson, the marshal of the United States for the said district of West Virginia, in pursuance of the attachment and monition appearing in the record of this case, took into his possession the said 1,440 packages of tobacco and now holds the same in his possession.

At the time of the seizure of the said tobacco by the said White, there was in each of the said packages a small slip of paper called a coupon with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale. These coupons were all alike and on each of them were the following words and figures, that is to say, upon one side thereof the following words and figures:

"*Merry World Tobacco Coupon.*

"With the tobacco packed herewith the purchaser has bought a definite share in any of the articles mentioned on the other side of this voucher.

"We will send you postpaid any or all of the articles listed on the other side for the number of coupons as stated.

"Mail these coupons to the Merry World Tobacco Co., Wheeling, W. Va., stating number of coupons sent, articles wanted, your name, treet and number, city or town, county and State."

On the other side of the coupon were the following words and figures:

"Will send you postpaid for

"20 coupons, 1 picture, 14 x 28, handsome water-color fac-simile, 12 subjects.

4 "30 coupons, 1 picture, 20 x 24, fine pastel fac-simile, 12 subjects.

"40 coupons, 1 picture, 20 x 30, beautiful Venetian scenes, 4 subjects.

"50 coupons, 1 picture, 22 x 28, elegant water-color gravures, 2 subjects.

"60 coupons 1 picture, 22 x 28, magnificent water-color gravures, 4 subjects.

"No advertising or lettering on any of the above. Such excellent works of art have never before been offered, except through dealers, at very high prices. They are suitable decorations for the most elegant home, and to be appreciated must be seen. See descriptive catalogue mailed on application. Order by subjects.

"20 coupons, 1 book of Popular Seaside Library, 300 titles by favorite authors.

"50 coupons, 1 cloth-bound book, 160 titles, by eminent authors. Catalogue of our books mailed on application.

"25 coupons, 1 scarf-pin solid sterling silver.

"25 coupons, 1 pipe, genuine French briar.

"40 coupons, 1 rubber tobacco pouch, self-closing.

"75 coupons, 1 elegant pocketbook, finest quality leather, gent's or ladies.'

"70 coupons, 1 pocket-knife, first quality American manufacture, razor-steel hand-forged, finely tempered blades. Stag handle. Your choice between jack-knife or pen-knife.

"95 coupons, 1 fine razor, highest-grade steel, hollow-ground.

"40 coupons, 1 bicycle lock, nick-led, gent's sprocket or lady's with chain.

"150 coupons, 1 cyclometer, 1,000 miles repeating. In ordering state size of wheel.

"550 coupons, 1 excellent open-face watch. Guaranteed without qualification. Has all improvements up to date. It will wear and perform well for a lifetime if only ordinarily cared for.

"Illustrated catalogue for the above mailed upon application."

5 One of the coupons aforesaid taken out of one of the said packages is hereto attached. The said coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself and has upon it no picture of any kind and does not affect in any way the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax. The value of the said five cases of tobacco of 288 packages each, is and was when they were seized as aforesaid fifty-four dollars ($54.00). And the said packages were when seized owned by Emanuel Felsenheld.

The practice of packing similar coupons in similar packages of

tobacco manufactured and packed for sale and of selling such packages throughout the country has been followed by a number of different manufacturers for ten or more years.

During some portions of the same period a practice was followed by some manufacturers of packing in their packages of tobacco other articles having some intrinsic value, such as pen-knives, pictures and other things.

These practices and their relation to the administration of the revenue laws have been at various times presented for consideration to the Commissioner of Internal Revenue of the United States and other officers of the Government.

On the 4th day of November, in the year 1891, Honorable John W. Mason, then Commissioner of Internal Revenue of the United States, issued to collectors of internal revenue a circular of which the following is a copy:

"*Circular No.* 371.

"Marks and contents of packages of tobacco.

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, D. C., *November* 4, 1891.

"To the collectors of internal revenue:

"Manufacturers of tobacco, in marking the gross, tare, and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare
6 subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by collectors to prevent foreign articles of any kind being included in the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else.

"You will please notify the manufacturers in your district of the necessity hereafter for a full compliance with the terms of this circular.

"JOHN W. MASON,
"*Commissioner.*"

On the 24th day of July, in the year 1897, Honorable W. S. Forman, then Commissioner of Internal Revenue of the United States, issued a circular of which the following is a copy:

"*Relative to the Provisions of the Act of July 24, 1897, as to Tobacco, Cigars, and Cigarettes.*

"1897.

"Department circular No. 106, internal revenue No. 477.

"TREASURY DEPARTMENT,
"OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
"WASHINGTON, D. C., *July* 24, 1897.

"The attention of collectors of internal revenue and other officers is called to section 10 of the act of July 24, 1897, entitled 'An act to provide revenue for the Government and to encourage the industries of the United States,' which provides as follows:

"SEC. 10. That section thirty-three hundred and ninety-four of the Revised Statutes of the United States, as amended, be and the same is hereby further amended, so as to read as follows:

7 "'Upon cigars which shall be manufactured and sold, or removed for consumption or sale, there shall be assessed and collected the following taxes, to be paid by the manufacturer thereof: On cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, three dollars per thousand; on cigars, made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, one dollar per thousand; on cigarettes, made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, three dollars per thousand; on cigarettes, made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, one dollar per thousand: Provided, that all rolls of tobacco, or any substitute therefor, wrapped with tobacco, shall be classed as cigars, and all rolls of tobacco, or any substitute therefor, wrapped in paper or *or* any substance other than tobacco, shall be classed as cigarettes.

"'And the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall provide dies and adhesive stamps for cigars weighing not more than three pounds per thousand: Provided, that such stamps shall be in denominations of ten, twenty, fifty, and one hundred, and the laws and regulations governing the packing and removal for sale of cigarettes, and the affixing and cancelling of the stamps on the packages thereof, shall apply to cigars weighing not more than three pounds per thousand.

"'None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon, said packages, or

8 their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward.'

"These provisions went into effect on this date and will be im-

mediately enforced. The rate of tax accrues on cigars and cigarettes removed for consumption or sale on and after July 24, the date the act was approved.

"This act makes a new definition of cigars and cigarettes. Cigarettes which have been called 'all-tobacco cigarettes' are now designated as cigars.

"The tax on cigarettes weighing not more than three pounds per thousand is double the old rate.

"Manufacturers will not be allowed to remove from the factory cigarettes which are not properly stamped under the new law.

"Proper stamps are being prepared and will be furnished collectors upon requisition.

"All packages of smoking tobacco, fine-cut chewing tobacco, or cigarettes, containing articles prohibited as above, or having such articles attached or connected therewith, or advertising any promise or offer of gift, premium, reward or prize, contrary to the provision above set forth, are subject to seizure, if found to have been removed from the factory and put upon the market after this date.

"Collectors will immediately notify all manufacturers of cigars and tobacco of the provisions of the law above recited as far as they are affected thereby.

"W. S. FORMAN,
"*Commissioner.*"

Approved:
"L. J. GAGE, *Secretary.*"

On the 2nd day of August in the year 1897, the said Commissioner Forman issued another circular of which the following is a copy:

9 "*Modification of Department Circular No. 106, Internal Revenue No. 477.*

"1897.

"Department circular No. 115, internal revenue No. 479.

"TREASURY DEPARTMENT,
"OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
"WASHINGTON, D. C., *August* 2, 1897.

"Department circular No. 106, internal revenue No. 477, is hereby revised and modified as follows:

"All of the paragraph commencing on page one and reading as follows:

"'All packages of smoking tobacco, fine-cut chewing tobacco, or cigarettes, containing articles prohibited as above, or having such articles attached or connected therewith or advertising any promise or offer of gift, premium, reward or prize, contrary to the provision above set forth, are subject to seizure, if found to have been removed from the factory and put upon the market after this date,' is hereby revoked and the following substituted:

"All violations of the last paragraph of section 10 of the act of July 24, 1897, with reference to packing foreign matter inside of statutory packages, and marking or printing offers of reward as inducements for sale, etc., upon the outside, will be referred to this office for instructions.

"The right of this office to make seizures for violations of the paragraph referred to having been questioned, seizures will not be made unless ordered by this office.

"W. S. FORMAN,
"*Commissioner.*"

"Approved:
"L. J. GAGE, *Secretary.*"

In the month of October, in the year 1897, the said Commissioner Forman made his annual report to the Secretary of the Treas-
10 ury, which by the Secretary of the Treasury was in due course transmitted to Congress in December of that year, in which report the said Commissioner used the following language:

"The last paragraph of section 10 of the act of July 24, 1897, above quoted, prohibits packages of smoking tobacco, fine-cut chewing tobacco, and cigarettes from having packed in, or attached to, or connected with them, any article or thing whatsoever of a foreign nature, and provides that there shall not be affixed to or branded, stamped, marked, written or printed upon said packages, or their contents, any promise or offer, or any order or certificate for, any gift, prize, premium, payment or reward.

"These provisions apply to cigars weighing not more than three pounds per thousand, as they are made by the same section subject to the law governing the packing and removal for sale of cigarettes.

"Whether by accident or design, packages of plug tobacco, snuff, and cigars weighing more than three pounds per thousand are not included.

"As these provisions were inserted in the bill while in conference and without having passed either house, this office has not the benefit of the discussions in Congress which usually accompany measures proposed and enacted and throw light upon the object and purpose of the law.

"Manufacturers have been notified of these provisions, and while there has been manifested in general a disposition to comply with the law, many complaints have been made as to its arbitrary features and doubts raised as to its constitutionality.

"It will be observed that there is no penalty provided for its violation, and if there is any penalty it must be found in some other law previously passed. The removal of tobacco which is not put up in 'proper packages' is a punishable offense under section 3374 Revised Statutes. The law also provides the penalty of forfeiture for
11 removing tobacco otherwise than is provided by law. (Section 3372, R. S.)

"It is doubtful if the courts would hold that the penalties provided by these sections are applicable, and the same may be said of section 3456, Revised Statutes, which is intended to cover by general pro-

vision those instances where acts have been enjoined or forbidden by the statute and no specific penalty elsewhere imposed.

"As far as the protection of the revenue is concerned, this office does not regard such stringent provisions necessary. They cause annoyance to a large class of taxpayers without furnishing additional security to the Government in the matter of preventing fraud.

"I would recommend that the law be amended so as to authorize the Commissioner to prescribe by regulations what statutory packages of tobacco, snuff, cigars, and cigarettes may contain, or authorize him to prohibit the packing in such statutory packages of articles which increase appreciably the size or weight of the package under penalty of seizure and forfeiture."

In the year 1898 while similar legislation was pending before Congress, Honorable N. B. Scott, then Commissioner of Internal Revenue, wrote a letter to the chairman of Ways and Means Committee of the House of Representatives of the United States in the following words:

"SIR: Referring to my visit on the 22nd inst., in regard to legislation amending section 10 of the act of July 24, 1897, I have the honor to herewith inclose draft of bill which, it is believed, will accomplish what is desired by the Internal Revenue Bureau, for the more practical enforcement of the law."

The draft of the bill which was inclosed with the last-mentioned letter was in the following words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the last paragraph of section 10 of the act of July 24, 1897, be and the same is hereby amended so as to read as follows:

"'That the statutory packages containing tobacco, snuff,
12 cigars or cigarettes, in which is packed or to which is attached any article or thing whatsoever (except such as, by reason of not noticeably or appreciably increasing the size or weight of the package, is permitted by regulation or instruction duly promulgated by the Commissioner of Internal Revenue) shall be subject to seizure and forfeiture.'"

On the 17th day of May in the year 1898, the said Commissioner Scott addressed a letter to the chairman of the Finance Committee of the Senate of the United States with respect to a bill then pending before Congress in which letter the following language was used:

"Inclosed please find a copy of the bill as amended by your committee and reported by you on the 12th inst. with proposed changes effected by erasures and interlineations indicating additional amendments which in the opinion of this office should be made. Nearly all of the proposed amendments are of an administrative character. Under the head of tobacco, cigars, cigarettes and snuff, page 7, line 11, after the word 'ounces' an amendment is suggested authorizing the inclosure in the packages of tobacco of certain labels, advertisements or vouchers, not of a pictorial nature, as shall not appreciably increase the size or weight thereof. This office under existing law does not permit such labels, &c., to be inserted, but sees no reason why manufacturers of tobacco shall be deprived of this method of

advertising, provided the practice is limited in the manner indicated so that there will be no loss of revenue resulting therefrom."

On the 20th day of May in the year 1898 the said Commissioner Scott wrote to the same member of the Senate committee a letter containing the following language:

"In compliance with your request for an amendment authorizing the enclosure of labels, advertisements and vouchers, not of a pictorial nature, in packages of tobacco authorized by the bill, providing that the weight of the enclosed labels, advertisements and vouchers shall be included in the weight of the tobacco and taxed as tobacco, and providing also for levying a tax on
13 stock on hand which shall be equal to one-half the increase in tax, it is suggested that the objects desired may be accomplished by inserting after word 'ounces' on line 11, page 7, and before the word 'and' where it first occurs, on line 19, page 10, the following:

"and in addition to the tobacco inclosed or packed therein, there may be enclosed or packed in the packages of tobacco now or hereafter permitted by law, such labels, advertisements, or vouchers not of a pictorial nature as shall not appreciably increase the size thereof or weigh more than a pound to each one thousand of such labels, advertisements or vouchers, subject moreover, to such regulation as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury may prescribe. Provided further, that in determining the weight of these packages for purposes of taxation, the weight of the inclosed labels, advertisements and vouchers shall be included."

On the 6th day of August in the year 1898, the said Commissioner Scott sent to the Secretary of the Treasury of the United States a communication in the following words and figures:

"WASHINGTON, D. C., *August* 6, 1898.

"To the honorable Secretary of the Treasury.

"DEAR SIR: I submit for your consideration the following:

"By the tariff act of July 24, 1897, it was provided: None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in or attached to or connected with them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes respectively, etc.

"In August, 1897, in a department circular, issued by my predecessor with your approval, it was stated that the powers and duties of this bureau under the act quoted had been called in question; and collectors were therefore directed to make no seizures, but to report to the bureau any violations of the act.

14 "Complaints have been received that certain manufacturers still continue a practice theretofore expressly permitted by this bureau of enclosing in packages of tobacco printed matter, advertisements or vouchers, sometimes called 'coupons,' which do not appreciably increase the size or weight of the package or embar-

rass the assessment or collection of revenue, and are not pictorial nor in aid of lottery schemes.

"This practice has continued openly, without concealment and under claim of right, and up to this time no prosecutions have been instituted either by my predecessor or myself.

"In November last my predecessor, Commissioner Forman, in his report transmitted by you to Congress, called attention to this act, expressed doubts whether it could be enforced by suit, and stated that the exclusion of such printed matter from tobacco packages was not necessary for any revenue purpose, and that it would cause annoyance to a large class of taxpayers.

"Since I have myself occupied the office of Commissioner I have not found that the exclusion of such matter as that in question would furnish additional security to the Government or help to prevent fraud, or that its inclusion in any way embarrassed either the assessment or collection of the revenues. Such being the case in March last, upon my recommendation a bill was introduced which definitely permitted the inclusion of such matter, under proper regulations and provided for enforcing the exclusion of bulkier articles.

"Congress recently adjourned with this bill still pending.

"Some of the manufacturers who have followed the practice above mentioned have prepared and tendered for my use a circular in the form hereto annexed entitled 'Proposed circular,' with the desire of having the question submitted to the Attorney General for his opinion, and for that purpose such other action as you may deem best to take is respectfully submitted with the request that I be advised of the conclusion reached.

15 "I find in the law no specific instruction for either seizure or prosecution. No revenue interest would be involved either in any ruling which I might make upon this point or in any test case which might be instituted. Any prosecution will doubtless be strenuously resisted and serious legal questions will be raised.

"I respectfully beg to be advised what course should be adopted. If a test case is determined upon, I will proceed with that according to the methods established by the precedents of the department.

"Yours respectfully, N. B. SCOTT,

"*Commissioner.*"

The circular which is referred to in the last-mentioned letter of the said Commissioner Scott to the Secretary of the Treasury, was in the following words and figures:

"*Proposed Circular.*

"The history of the bureau shows that in the year 1891 and for a considerable while before that year the assessment and collection of internal-revenue taxes had been embarrassed by the introduction into packages of tobacco of other articles such as pocket-knives, photographs and other things. Thereupon the bureau issued the following regulation:

"*Circular No.* 371.

"Marks and contents of packages of tobacco.

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *November* 4, 1891.

"To the collectors of internal revenue:

"Manufacturers of tobacco, in marking the gross, tare and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by collectors to prevent foreign articles of any
16 kind being included in the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else.

"You will please notify the manufacturers in your district of the necessities hereafter for a full compliance with the terms of this circular.

"JOHN W. MASON,
"*Commissioner.*

"Soon after the issuing of this circular a question arose whether the regulation applied to many things in themselves unobjectionable which had commonly been included with the tobacco. Manufacturers who had not been in the habit of placing in their packages pocket-knives, photographs or other similar things, had habitually placed in the packages advertisements of various kinds and in some instances vouchers such as are commonly known as coupons. The question having been raised it was promptly decided by the Commissioner who issued this regulation, that circular No. 371 was not intended to apply to such things as did not materially increase the size or weight of the package.

"From that time to the present the settled practice of the bureau has been in accordance with that decision. The rule has worn well and the business of the department has been satisfactorily carried on under it. The shapes and sizes of the packages have given no cover for fraud and have been such that claims could not be made for an allowance from the weight of the package on the ground that non-taxable articles were included in it. On the other hand both the manufacturers and the public have still been permitted to obtain the advantages which could be permitted to them without interfering with the work of the department. Vouchers or coupons of inappreciable weight were included in the packages which entitled the purchaser to receive from the manufacturer specified articles.

17 "The practice thus adopted offered no place for lotteries or schemes of chance nor for objectionable pictures. At the same time inasmuch as the weight and size of the vouchers or advertisements rather than the matter printed upon them, were made the criterion of their lawfulness, it was perhaps possible to cover under the ruling of the department papers, cards or advertisements connected with lotteries or schemes of chance or hazard. In order that no doubt might be left of the intention of the law emphatically to prohibit any such schemes, the Congress of the United States included in the act of 1897 the following provision:

"'None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, with the internal-revenue stamp and the tobacco or cigarettes respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed to, or branded, stamped, marked, written or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium or reward.'

"When the previous history of the department and the state of the pre-existing law are considered, it can scarcely be doubted that the two evils at which this statute was pointed, were first, the suppression of lottery schemes, including schemes of chance or hazard; and secondly, the suppression of the circulation of objectionable pictures. These latter, while not specifically mentioned in the statute, are fairly within its prohibition. They are not inappreciable in weight. They are prized, if at all, for their own sake. They come fairly within the language and even more clearly within the manifest purpose of the statute.

"A careful consideration of this provision of the statute makes it clear therefore that the law was not intended to apply to such advertisements or vouchers as do not appreciably increase the
18 weight or size of the package and such as are free from the taint belonging to lottery schemes and schemes of chance or hazard. The law has been thus understood by the department as was manifested by the practice under it as well as by the report submitted by my predecessor on November 1st, 1897.

"While it is perhaps unnecessary that I should go beyond the matters which have already been adverted to, it may be of interest to note, as corroborating the conclusions at which I have arrived, that a number of the State courts have rendered decisions upon the same lines. These were in cases involving State legislation pointed at vouchers or coupons, and it will be found that the State courts have uniformly either decided that such legislation was unconstitutional or else have so construed the statutes as to permit these vouchers and coupons to be used. Long *v.* Maryland, 74 Md., 565; Commonwealth *v.* Emerson, 165 Mass., 146; People *v.* Gillson, 109 N. Y., 389. In the case last cited an exhaustive opinion was delivered by Mr. Justice Peckham, then a member of the New York court of appeals and now of the Supreme Court of the United States.

"In determining what shall be considered an inappreciable weight it is perhaps necessary to adopt some arbitrary rule and it seems to me to confine the vouchers or coupons to a weight not exceeding one one-thousandth of a pound will certainly accomplish all the desired results.

"Collectors are therefore instructed:

"That there will not be permitted to be packed in, attached to, or printed upon, any package of tobacco any article or thing, printed matter, impression or print of any sort whatever, other than manufacturers' labels, that—

"(*a*) Appreciably increases the size of the package, or weighs more than 1-1000 of a pound;

"(*b*) Advertises, mentions, or is in any way in aid of, or a factor of any lottery, or other scheme involving chance or hazard; or

"(*c*) Is of a pictorial nature, except manufacturers' trade-marks, labels, &c., now permitted on the outside of packages.

19 "Collectors will promptly report for instructions as to procedure all violations or supposed violations of this ruling, together with full statement in detail of the precise character of such violation or supposed violation."

After receiving the last-mentioned communication from the said Commissioner Scott, the Secretary of the Treasury submitted the same to the Attorney General of the United States with a request for an opinion upon the matters therein contained, and on the 19th day of August, in the year 1898, Honorable James E. Boyd, Assistant Attorney General of the United States, transmitted to the Secretary of the Treasury a communication approved by the Attorney General of the United States, and which was in the following words and figures:

"DEPARTMENT OF JUSTICE,
"WASHINGTON, D. C., *August 19th*, 1898.

"The honorable the Secretary of the Treasury.

"SIR: I have the honor to acknowledge receipt of your letter of the 9th instant asking to be advised whether the prohibition contained in section 10 of the tariff act of June 24, 1897, purporting to amend Revised Statutes, section 3394 as amended, can be enforced under Revised Statutes, section 3456, or under any other law relating to the subject. The prohibition in question is as follows:

"None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward. Section 3456 R. S., which is one of the provisions of the internal-revenue laws common
20 to several objects, omitting such of the said section as is not pertinent to the inquiry in hand, is as follows:

"If any * * * manufacturer of tobacco or cigars shall knowingly or wilfully omit, neglect, or refuse to do or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this title prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting or refusing to do, or for the doing or causing to be done the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be * * * a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory shall be forfeited to the United States.

"The first question which arises is as to whether this is a case in which the Attorney General is authorized by law to give an opinion. The question presented, in some respects, is not one arising in your department, but belongs more properly to this department and the courts of justice, and the inquiry whether a proceeding under section 3456, or under any other law, would or would not be successful is a judicial question on which it is not necessary or proper for me to give an official opinion. (20 Opin., 702.)

"However, I regard the matter as one of such importance that I do not think proper to dismiss it without making a suggestion that it be tested as early as practicable in the courts. This legislation undoubtedly involves several important legal questions which I think should be passed upon by the courts before an effort is made to put it into general execution.

"It is not apparent to me that this paragraph in any way affects the collection of taxes upon manufactured tobacco, and it is probable that Congress had another object in view in its enactment. The latter part of the paragraph quoted seems to indicate that the intention of the act was to exclude from packages of manufactured tobacco, cigars and cigarettes things which were, in the judgment of Congress, immoral, or in some other like way objectionable.

21 Now, Congress has the power, in connection with the manufacture and sale of tobacco, aside from the regulation of interstate commerce in that article, to provide for the collection of internal-revenue taxes therefrom; but this law is aimed at the sale, gift, or distribution, without any reference to interstate commerce, of articles accompanying packages of manufactured tobacco. There is at least plausible ground upon which to base the contention that such restriction of private rights is not authorized by the Constitution, The power to collect revenue from specific articles does not necessarily imply a power to regulate the business of citizens with regard to other subjects. It is a question which admits of much doubt, whether Congress when it enacts laws for the purpose of raising revenue from the business of manufacturing and selling tobacco, is warranted in enacting in connection therewith legislation to protect the morals of the people. It has been held by the Supreme Court of the United States in the case of U. S. *vs.* E. C. Knight Company, 156 U. S., 1, that these matters belong exclusively to the States.

"Aside from this, the paragraph quoted presents some difficulties

in the way of the effectual enforcement of its provisions by seizures, fines, or the like. Penal statutes, according to the fundamental principles, should clearly prescribe the offence and its punishment and point out the offender; so that a man may not be condemned for an act which he reasonably supposes himself at liberty to commit with impunity.

"I would suggest, therefore, that the Commissioner of Internal Revenue cause to be instituted through some one of the collectors a proceeding by which the validity and scope of this law can be tested in the courts. A seizure of packages containing the prohibited articles can be made and a criminal warrant issued against some
22 manufacturer or other person who is alleged to have violated the provisions of the paragraph, and thus a case can be brought before the courts and the questions involved judicially determined.

"Respectfully,

JAMES E. BOYD,
"*Assistant Attorney General.*

"Approved:
"JOHN W. GRIGGS,
"*Attorney General.*"

It is further agreed that the Internal Revenue Bureau does not hold it to be essential to an honest and full collection of the tax upon manufactured tobacco, to prohibit the introduction into statutory packages of coupons, used purely for advertising purposes, immaterial in weight, and size and it is further agreed that for a considerable time before the institution of the present case, there had been frequent complaints made to the Government by private persons or corporations who were interested in the discontinuance by the defendant and others of the use of the said coupons. These complaints were to the effect that the said coupons were within the prohibition of the statute, that the law with respect to them was not being enforced and that it ought to be enforced. It was because of such complaints that the above-entitled case was instituted and is being prosecuted, and also because of the insistence by private persons or corporations who were interested in the continuance, by the defendant and others, of the use of the said coupons. And it is agreed that the suit was understood to be a friendly one to settle controversies between the rival interests by judicial decision, and in accordance with the suggestions made by the Department of Justice that the Commissioner of Internal Revenue should cause to be instituted a "proceeding by which the validity and scope of the law can be tested in the courts." The right is reserved to either party to object at the hearing to the relevancy of anything contained in this statement.

23 It is further certified that upon these facts the district court entered a judgment forfeiting to the Government the five cases of tobacco of 288 packages each and directed them to be sold by the marshal.

Whereupon the cause was taken on error to the circuit court of appeals for the fourth circuit, and having come on for argument at

the November term, in the year 1900, of the said circuit court of appeals for the fourth circuit before the undersigned, and the said circuit court of appeals desiring, in order to the proper decision of the cause, the instructions of the Supreme Court of the United States concerning certain questions or propositions of law arising in said cause:

Now, therefore, we, the undersigned, do hereby certify the said questions or propositions of law to the Supreme Court of the United States for instruction as aforesaid:

First. Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States.

Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.

Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein
24 described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?

Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes?

Witness our hands this 27th day of November, in the year 1900.

NATHAN GOFF,
Senior Circuit Judge.
CHARLES H. SIMONTON,
Circuit Judge.
THOS. R. PURNELL,
District Judge.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the original certificate of the questions of law certified to the Supreme Court of the United States, filed and now remaining of record in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the U. S. circuit court of appeals for the fourth circuit, at Richmond, this 3d day of December, in the year of our Lord nineteen hundred.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

Endorsed on cover: (Certificate.) File No., 17,984. U. S. C. C. of appeals, 4th circuit. Term No., 499. Emanuel Felsenheld, claimant of 288 packages of Merry World tobacco, plaintiff in error, *vs.* The United States. Filed December 6th, 1900.